

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MICHAEL HILL, et al.,	)	
Plaintiffs	)	CIVIL ACTION NO. 03-323 ERIE
	)	CIVIL ACTION NO. 03-355 ERIE
v.	)	CIVIL ACTION NO. 03-368 ERIE
	)	CIVIL ACTION NO. 04-11 ERIE
JOHN LAMANNA, et al.,	)	CIVIL ACTION NO. 05-160 ERIE
Defendants	)	

HEARING ON MOTION TO MODIFY CASE MANAGEMENT ORDER

Proceedings held before the HONORABLE  
SEAN J. McLAUGHLIN, U.S. District Judge, and  
the HONORABLE SUSAN PARADISE BAXTER, Chief  
U.S. Magistrate Judge, in Judge's Chambers,  
U.S. Courthouse, Erie, Pennsylvania, on  
Tuesday, November 14, 2006.

APPEARANCES:

RICHARD A. LANZILLO, Esquire, and NEAL DEVLIN,  
Esquire, (via Phone), appearing on behalf of  
the Plaintiffs.

MICHAEL COLVILLE, Assistant United States  
Attorney; PHILIP O'CONNOR, Assitant United  
States Attorney; and DOUGLAS GOLDRING, Assistant  
General BOP Counsel, (via Phone), appearing on  
behalf of the Defendants.

Ronald J. Bench, RMR - Official Court Reporter

P R O C E E D I N G S

(Whereupon, the proceedings began at 11:30 a.m., on Tuesday, November 14, 2006, in Judge's Chambers.)

JUDGE BAXTER: Good morning.

MR. COLVILLE: Good morning, your Honor.

MR. LANZILLO: Good morning, your Honor.

JUDGE BAXTER: I'm going to call the cases. We have Civil Action No. 03-323 Erie. No. 03-355 Erie. No. 03-368 Erie. No. 04-11 Erie, and No. 05-160 Erie. It is a series of cases that we refer in the office to as Hill v. Lamanna, et al., in regards to the silica dust issue at FCI McKean. On the phone we have Mr. Lanzillo, are you there?

MR. LANZILLO: I am, your Honor.

JUDGE BAXTER: Mr. Colville, are you there?

MR. COLVILLE: Yes, your Honor.

JUDGE BAXTER: And we have others as well?

MR. COLVILLE: Yes, Phil O'Conner from our office.

MR. LANZILLO: Your Honor, we have Neal Devlin in my office, as well as our paralegal, Lori Watson, who helps us with the scheduling here at the law firm.

JUDGE BAXTER: All right. I know that the way usually it works is you do a consented motion for an extension of time and the judge signs it, it pops up on your e-mail and

1 everything is right with the world. But in this case we really  
2 have a problem with time. And you all know about that. I also  
3 know that you're busy trying to get all this done. I went and  
4 I talked to Judge McLaughlin this morning. And we tried to  
5 come up with a plan that will work for everybody. However, as  
6 you know, it's my job to make sure the plan works for him  
7 first. And here we are. We are going to allow discovery to  
8 continue until January 3rd. The news that might be most  
9 discomfoting to you is that dispositive motions will be due  
10 that day as well. And we're only going to give you until  
11 January 17th to respond to dispositive motions. The problem is  
12 we have to get together, with the way the juries are planned,  
13 if these were only FTCA cases, that wouldn't be a big issue,  
14 but we have to go with the trial terms. Then the cases, if  
15 they survive or what survives, however, that works, will be  
16 part of the March 12th trial term. And I fear Judge McLaughlin  
17 was adamant about that. So I could rule differently, but once  
18 it was in front of him, that judge change. It just as easily  
19 could have gone to him to work this out as best we could. All  
20 right. As far as the dental issue on Michael Hill, the judge  
21 wants to carve that out separately. And here's how that will  
22 work. Discovery will close on the 1st of December, that will  
23 not change as to the dental issue. The trial will be scheduled  
24 in this case, if it survives summary judgment, and the trial  
25 has already been set on his schedule for February 5th and 6th.

1 So don't have summary judgment changes in that case, we'll keep  
2 those the same dates that they were. Since the discovery  
3 closes the same. Now, I wanted to get that all out of the way,  
4 now you can start talking for a minute and start telling me why  
5 I'm killing you and we'll see what we can do. Then, again, if  
6 it's okay with you, I'm a happy person and we'll just adjourn.

7 MR. LANZILLO: I don't know whether to go first or  
8 not, this is Rich Lanzillo, judge. Obviously, we will live  
9 with whatever schedule the court issues. That will be an  
10 exceptionally challenging schedule to make work, as far as on  
11 our end. We are in the process of scheduling the depositions  
12 of Mr. Lamanna, Mr. Housler, Mr. Collins, Rob Bevevino, Marty  
13 Sapko, Deborah Forsyth and David English. And there may be  
14 some additional discovery that falls away from those  
15 depositions or rises out of those depositions. I know that Mr.  
16 Colville intends to obtain independent medical examinations or  
17 seek IMEs for various defendants as well. I guess the only  
18 concern is on the dental claim -- is that we would have to ask  
19 Mr. Colville's indulgence in helping us to arrange the Collins  
20 deposition very promptly, and there would be at least one other  
21 one we would have to schedule on an expedited basis.

22 JUDGE BAXTER: Is it my recollection that is only a  
23 Bivens claim and not a FTCA claim?

24 MR. LANZILLO: That would be an FTCA claim as well.

25 JUDGE BAXTER: So it's both, all right.

1 MR. LANZILLO: Judge, we do have some discovery  
2 outstanding where we're asking, requesting identification of a  
3 couple of the additional employees of the prison system  
4 regarding the dental claims. We have yet to receive a  
5 response, answer responses regarding the identity of those  
6 individuals, and then promptly schedule their depositions as  
7 well. I would have to work with defense counsel to try to  
8 conduct and include that discovery, also, on a very expedited  
9 basis.

10 JUDGE BAXTER: I understand. But it's also three  
11 years past, and it has taken a long time, I know it took a long  
12 time, Mr. Lanzillo, for you get on board. But a lot of this  
13 stuff could have been going before. Also, I wanted to remind  
14 both sides that summary judgment here has to be prudent. Don't  
15 give me stuff that is a factual issue or that you know is in  
16 dispute. I mean we took care of motions for summary judgment  
17 ahead of our typical schedule. We moved that along quickly.  
18 And I know you're all busy as well. We need to get this  
19 discovery done. And I thought I was very clear about that when  
20 we set the schedule. Realizing that it's difficult, realizing  
21 these people are all over the place in federal prisons  
22 elsewhere, we are trying to give you some more time. But I  
23 don't even think the circuit will be that giving, as it's been  
24 three years.

25 MR. LANZILLO: We will make it work, judge.

1 JUDGE BAXTER: Mr. Colville, you're very quiet  
2 over there?

3 MR. COLVILLE: I don't know where to begin, your  
4 Honor. With regard to the three-year period, let me start by  
5 saying Kelly and Siggers, I think it took them a year to serve  
6 us. We were prompt in filing our motion for summary judgment.  
7 I don't think there's anything that the government could have  
8 done in the case to make us to get to where we are now any  
9 faster. That said, and I appreciate that the court doesn't  
10 want this three-year case to be lingering for policy reasons  
11 that I think are now in existence with the court in the Western  
12 District, but I think given the magnitude of the facts, these  
13 individuals are being, these people are being sued in their  
14 individual capacities, they aren't suing the United States  
15 government or a representative, they're suing individuals.

16 JUDGE BAXTER: On the Bivens?

17 MR. COLVILLE: That's all this case is except for  
18 one claim regarding the dental, which has a Bivens aspect to it  
19 as well. While I certainly appreciate and understand and will  
20 obviously abide by whatever the court orders about the timing  
21 of this, given what I know about the case thus far and the  
22 logistics involved with getting depositions of inmates, who are  
23 scattered all over the country, getting copies of the medical  
24 records and the dental records and miscellaneous workplace  
25 records, and getting them to opposing counsel, then in turn

1 hiring an industrial hygienist and medical experts who need to  
2 review them, in order that they may review the records so as to  
3 tell me whether or not there is a legitimate issue for the  
4 court to consider again, with regard to a motion for summary  
5 judgment. Let me stop here by saying I will not file a motion  
6 for summary judgment on a trivial issue to make this thing any  
7 longer. I think I indicated that previously to the court at a  
8 status conference. But I believe that the key to our defense  
9 and the key possibly to a motion for summary judgment, which  
10 may resolve this case without trial, is testimony that the  
11 court may be able to get from an industrial hygienist and a  
12 medical expert, who will say one of two things or maybe both.  
13 One, this was not a hazardous environment condition at the  
14 UNICOR factory. If that's the case, and if there is no  
15 evidence to the contrary which overwhelms that testimony,  
16 plaintiff can't meet their burden of proof and the case goes  
17 away. Similarly, if the medical experts, after having  
18 conducted an independent medical examination of these patients,  
19 which I believe is a requirement in the case, I don't think the  
20 case can go forward without expert testimony from the  
21 plaintiffs, suggesting or stating that there is a causal  
22 relationship. If my expert comes in and says there is no  
23 medical injury which can in any way be related to the cutting  
24 of the Micore board or Locweld, then likewise the plaintiffs'  
25 case fails and it doesn't go to trial. I have worked as fast

1 and furious as I can in getting all of this done, and had a  
2 meeting yesterday with my pulmonologist, Dr. Gregory Fino. I'm  
3 sitting here looking at my computer screen, where I have  
4 prepared a motion, which I intend to file today or soon  
5 thereafter, asking the court to direct the Marshals to have  
6 these individuals transported to St. Clair Hospital for an  
7 independent medical examination. I have dates which my doctor  
8 is available to do that. The dates are December 21st, January  
9 2nd, January 3rd, January 8th and January 16th. All of which  
10 is laid out in my motion that the court will then be receiving.  
11 The court may very well deny it and tell me I don't have enough  
12 time to do that.

13 JUDGE BAXTER: All right. First of all, there's a  
14 whole bunch of things you said.

15 MR. COLVILLE: I still have some more.

16 JUDGE BAXTER: Let me talk about these while they're  
17 in my head. First of all, a new summary judgment standard is  
18 being proffered there, it's not whether or not there is  
19 evidence that overwhelms your evidence on expert testimony,  
20 it's whether or not there is evidence that makes it a question  
21 of fact in dispute.

22 MR. COLVILLE: That's correct.

23 JUDGE BAXTER: Secondly --

24 MR. COLVILLE: Pardon me for interrupting the court,  
25 my point is with regard to medical evidence, if I proffer a

1 medical opinion, an expert medical opinion, I believe that the  
2 standard requires then for the plaintiffs to proffer a medical  
3 expert opinion saying this is an injury which was caused by the  
4 Micore boards or Locweld. If they're unable to do that, the  
5 case goes away. And I don't think they're going to be able to  
6 get a medical expert to say that. Now, I may be wrong or  
7 proven wrong about that. But in defending these individuals, I  
8 have to do this.

9 JUDGE BAXTER: And you're giving me a causation  
10 element in deliberate indifference.

11 MR. COLVILLE: No, this is a serious medical injury  
12 element --

13 JUDGE BAXTER: But the causation is an interesting  
14 comment.

15 MR. COLVILLE: Maybe I misspoke, your Honor. But  
16 they need to show an injury. Implicit in that or logically  
17 from that is the Micore board or the Locweld is what caused the  
18 injury.

19 JUDGE BAXTER: All right.

20 MR. COLVILLE: I guess my point is, your Honor --

21 JUDGE BAXTER: Let me also ask am I missing  
22 something, I thought these were FTCA cases, all of the cases?

23 MR. COLVILLE: No, they're only Bivens claims. The  
24 only work claim that is out there presently is a dental claim.  
25 As far as the FTCA claim, my understanding is the plaintiffs

1 are going to withdraw that with regard to three of the  
2 defendants, I don't have their names in front of me. Mr.  
3 Lanzillo can talk to that. And, again, I believe that's the  
4 cases that have been filed in '05.

5 MR. LANZILLO: There is a newer case, we had to do  
6 our due diligence on exhaustion.

7 MR. COLVILLE: Again, your Honor, these are  
8 individuals being sued in their individual capacity. If this  
9 was just against the government, I'd take it and bite my  
10 tongue. But I have to tell you --

11 JUDGE BAXTER: I understand. If you guys had  
12 consented on my jurisdiction, I don't give a hoot about the  
13 three-year list. That was your decision, but I have to go by  
14 the district judge.

15 MR. COLVILLE: Believe me, your Honor, I think we're  
16 all sort of here -- does the court want to try a case that  
17 hasn't been flushed out where proper defenses aren't given to  
18 individuals being sued in their individual capacity. Which if  
19 we force this, just for forcing sake because it's three years,  
20 that's what we will have done.

21 JUDGE BAXTER: I know the judge also feels like  
22 cases shouldn't be held in abeyance during summary judgment.

23 MR. COLVILLE: Is the court suggesting we should of  
24 in this case have had independent medical examinations of these  
25 federal inmates, who are scattered throughout the FCI prison

1 system and have them examined, conducted discovery, when what  
2 might have happened is that a motion for summary judgment would  
3 resolve the issue, and not cost any more money to either the  
4 plaintiffs or the defendants.

5 JUDGE BAXTER: What did you do in September or  
6 October?

7 MR. COLVILLE: In September or October we took five  
8 depositions via television. I went to Erie for two days. I  
9 went to visit the prison to meet with my witnesses. I had  
10 copies of numerous medical records and prison factory records  
11 copied and put on CDs and provided to opposing counsel. And,  
12 in addition, I've submitted my own discovery to plaintiffs'  
13 counsel, which has yet to be responded to. I'm not even sure  
14 if it's out of time or not. But the point being that -- by the  
15 way, I have been in contact with OSHA, I have to get  
16 authorization from them to get the records from OSHA. I have  
17 engaged a pulmonologist. I have met with him, I have discussed  
18 the matter. I have copied all the documents and provided them  
19 to him. I met with him yesterday. I'm in the process of  
20 organizing the independent medical examinations, which I'm  
21 hoping the court will help facilitate, because I can't get any  
22 prisoners from South Carolina or Virginia or West Virginia, to  
23 my doctor's office without two Marshals accompanying them.  
24 First flying them to Pittsburgh, then accompanying them out to  
25 St. Clair Hospital, after having an examination. I don't think

1 there is anything wrong with these people, that is my position.  
2 I have to confirm that. And that doesn't even take into  
3 account that I have to have an industrial hygienist review all  
4 the reports and be prepared to testify.

5 JUDGE BAXTER: All right, send me a motion, I'll get  
6 these people there.

7 MR. COLVILLE: I prepared it this morning. I met  
8 with the doctor yesterday, he gave me I think eight dates. And  
9 what I've done is I pulled five of the earlier dates that he  
10 gave me, and I've asked the court to order the Marshal to  
11 coordinate with me and the Bureau of Prisons the transportation  
12 of these inmates to Pittsburgh, in particular, St. Clair  
13 Hospital, on five days to have them examined, X-rays taken and  
14 pulmonary testing.

15 JUDGE BAXTER: That's such a problem, I know it  
16 takes six weeks to get them anywhere in the federal system, to  
17 get them to my court for a hearing.

18 MR. COLVILLE: Putting it that way again, we're not  
19 dealing with the ordinary cases. And we're not dealing with an  
20 ordinary case in the sense there are prisoners involved and two  
21 individuals defendants who do not work for the federal  
22 government.

23 JUDGE BAXTER: I understand that always the case in  
24 Bivens cases, that's not what throws me, as much as it does, I  
25 mean having them come into one place for medical examinations

1 is going to be a nightmare. Can you hold for one second.

2 MR. COLVILLE: Sure.

3 JUDGE BAXTER: I'm going to put this on mute.

4 (Off the record.)

5 JUDGE BAXTER: I just want you to know that I just  
6 asked Judge McLaughlin to come over to my chambers now. I gave  
7 him a thumbnail of what you've asked, some of the problems that  
8 you're encountering. Is everyone still on?

9 MR. COLVILLE: Yes. In addition, I brought Doug  
10 Goldring in, he's counsel for UNICOR.

11 JUDGE McLAUGHLIN: Mr. Colville?

12 MR. COLVILLE: Yes, your Honor, good morning.

13 JUDGE McLAUGHLIN: Who else is on the line?

14 MR. COLVILLE: Phil O'Connor is in the office as  
15 well, your Honor.

16 MR. LANZILLO: Your Honor, Rich Lanzillo and Neal  
17 Devlin.

18 MR. GOLDRING: This is Doug Goldring, your Honor.

19 JUDGE McLAUGHLIN: This is in no particular order of  
20 importance but, first of all, I understand, I'm talking to Mr.  
21 Colville, you have a physician who has to conduct a medical  
22 examination on each of these plaintiffs, is that right?

23 MR. COLVILLE: That's right, your Honor.

24 JUDGE McLAUGHLIN: That would occur where, in  
25 Pittsburgh?

1 MR. COLVILLE: Yes, your Honor.

2 JUDGE McLAUGHLIN: Has this fellow given you a date  
3 or dates upon which these examinations are supposed to take  
4 place?

5 MR. COLVILLE: Yes, your Honor, he's given multiple  
6 dates. As I told Magistrate Baxter, I met with him, he gave us  
7 dates that he's available. Half a dozen or maybe eight dates.

8 JUDGE McLAUGHLIN: In January, December?

9 MR. COLVILLE: December 21st. January 2nd, 3rd,  
10 4th, 8th, 16th, 17th, 18th and 22nd. I believe I picked the  
11 earliest of all those dates. I put them in this motion which I  
12 prepared this morning after I met with him last night. Where  
13 I'm asking the court to direct the Marshals to coordinate with  
14 the Bureau of Prisons and myself in transporting these inmates  
15 that are scattered in various FCI facilities.

16 JUDGE McLAUGHLIN: They're all in different prisons?

17 MR. COLVILLE: Yes, your Honor. I would have them  
18 brought here on those individual dates, to be subjected to, to  
19 submit to a physical examination, have chest X-rays done and  
20 pulmonary function testing done. Some of which I identify in  
21 the motion.

22 JUDGE McLAUGHLIN: Will each inmate be examined on a  
23 separate day or will they do it on one day?

24 MR. COLVILLE: What I've done is I've done them on  
25 separate days, only because the physician indicated to me that

1 the hospital would need one guard with one prisoner. I've done  
2 some preliminary work on their end and in speaking to the  
3 Marshal's wife, with all due candor, and she's informed me --

4 JUDGE McLAUGHLIN: Speaking with who?

5 MR. COLVILLE: The Marshal's wife works in our  
6 office, I spoke to her. Again, doing this with all candor,  
7 your Honor. She indicated to me the office policy is there  
8 have to be two guards. Having five inmates on one day at one  
9 hospital, I don't think it would work. I think it would work  
10 just as smoothly having one a day. Just to give you a heads  
11 up. Two of the individuals are at the same facility, I have  
12 scheduled them on back to back days. I presume they could be  
13 housed here, one could go on one day and one could go the other  
14 day, the following day or whatever the prison wants.

15 JUDGE McLAUGHLIN: Here's my question. Assuming you  
16 get them all done in early to mid January, all right, and the  
17 doctor expedites, turns around the reports, and it strikes me  
18 he's either going to see something or he's not. It would be  
19 relatively a report on either development. That having been  
20 said, my further understanding is if you get the report that  
21 you believe you're going to get, which you may get, which is  
22 that the doctor doesn't see any injury, then that in part is  
23 going to form the basis for a summary judgment motion, is that  
24 right?

25 MR. COLVILLE: I think so, your Honor. I think it's

1 an essential element of the plaintiffs' case. Without an  
2 injury, the case shouldn't be able to go forward.

3 JUDGE McLAUGHLIN: Here, without waying in on one  
4 side or the other on that because I will get that briefed up  
5 and we'll take a look at it. If that's accomplished, if you  
6 can accomplish all that, why can't this case continue to move  
7 on the same inexorable track toward a late March, maybe the  
8 last week of March trial date with me?

9 MR. COLVILLE: We didn't discuss that, your Honor.  
10 We were going with --

11 JUDGE McLAUGHLIN: I don't have a problem with you  
12 getting these people in and that motion being granted.  
13 Incidentally, have you checked, sometimes for reasons that are  
14 beyond the Marshal's control, it's very time consuming, it  
15 takes a lot of time to get prisoners in from the four-corners  
16 of the earth. Have you talked to anybody about the anticipated  
17 delay on this?

18 MR. COLVILLE: Your Honor, I have not. What I've  
19 done -- without belaboring it, since we last met we have been  
20 getting volumes of documents. I met with my expert for the  
21 first time face-to-face yesterday go get the earliest dates he  
22 could give independent examination dates. This morning I had  
23 begun working on a motion to be the intermediary of the  
24 Marshal. I don't know what to expect. I'm hoping for the  
25 best, I'm crossing my fingers, quite frankly. Rather than just

1 going through the Marshal directly, I thought by having an  
2 order of the court --

3 JUDGE McLAUGHLIN: Instead of going through the  
4 Marshal or the Marshal's wife?

5 MR. COLVILLE: That was just in passing here in the  
6 office.

7 JUDGE McLAUGHLIN: Get the motion in so we can get  
8 those people writted and moving. Let me ask Mr. Lanzillo, are  
9 you wrapping up your discovery?

10 MR. LANZILLO: Your Honor, we have some personnel  
11 from the prison system that are no longer employees. Mr.  
12 Colville and Mr. Goldring are cooperating in locating those  
13 individuals and making them available.

14 JUDGE McLAUGHLIN: Has everybody been doing what you  
15 have been doing with the thought in the back of your head that  
16 barring a resolution of this case by settlement or otherwise,  
17 you're looking at a late March trial term, has that been on the  
18 radar?

19 MR. COLVILLE: It has been on my radar, your Honor.  
20 I mean, I'm not happy about it, I mean I'm stuck.

21 JUDGE McLAUGHLIN: Let's go off the record here for  
22 a second.

23 (Discussion held off the record.)

24 JUDGE McLAUGHLIN: Back on the record here. So  
25 that's the bottom line. I will leave it to Judge Baxter here,

1 you can tinker with your motion for summary judgment dates, in  
2 light of the anticipated medical exams. One way or the other  
3 this case is going to go then. Now, I also understand, I want  
4 to make sure this is correct, that the FTCA claims are being  
5 abandoned, is that right?

6 MR. LANZILLO: There's one remaining FTCA claim,  
7 your Honor. All others have fallen away.

8 JUDGE McLAUGHLIN: What is the remaining FTCA claim?

9 MR. LANZILLO: The dental claim.

10 MR. DEVLIN: Your Honor, Neal Devlin. I believe the  
11 vast majority of the FTCA claims are gone for a failure to  
12 exhaust administrative remedies.

13 JUDGE McLAUGHLIN: Were they dismissed by the  
14 magistrate judge or were they voluntary dismissed, what  
15 happened?

16 MR. DEVLIN: I believe most of them were dismissed  
17 through a motion for summary judgment or motions for dismissal.  
18 It may be three individuals, three individual defendants who  
19 had retaliation claims that, I believe the court didn't dismiss  
20 them, reserved judgment, said let's see what comes out of  
21 discovery. We're pursuing that in discovery, we've been in  
22 contact obviously with -- we've indicated to them if nothing  
23 comes of it, we will voluntary withdraw all claims against --

24 JUDGE BAXTER: A retaliation claim is not part of  
25 the amended complaint.

1 MR. DEVLIN: Except for the dental claim, correct,  
2 your Honor.

3 JUDGE BAXTER: I believe that's right, they were  
4 abandoned?

5 MR. DEVLIN: They were, your Honor. Yes, your  
6 Honor.

7 JUDGE BAXTER: They're not involved at all?

8 MR. DEVLIN: Correct.

9 MR. COLVILLE: We have three named defendants, three  
10 named defendants are lingering out there. It's more a matter  
11 of housekeeping.

12 JUDGE McLAUGHLIN: Let me just ask plaintiffs'  
13 counsel, is there a remaining FTCA claim that you continue to  
14 litigate?

15 MR. LANZILLO: Yes, your Honor, that would be the  
16 dental claim only.

17 JUDGE McLAUGHLIN: Is there a deliberate  
18 indifference claim as part of that case?

19 MR. LANZILLO: Yes, your Honor.

20 JUDGE McLAUGHLIN: Let's talk a little bit about  
21 that dental case then.

22 JUDGE BAXTER: We have the dates scheduling that for  
23 trial. We scheduled that February 5th and 6th.

24 MR. COLVILLE: Both on the Bivens and the tort  
25 claim?

1 JUDGE BAXTER: Yes.

2 JUDGE McLAUGHLIN: So what I have is a jury trial  
3 and a non-jury trial at the same time?

4 MR. COLVILLE: Correct, your Honor.

5 JUDGE McLAUGHLIN: We'll talk more about that later.  
6 But for present purposes I just wanted to pop in and get a  
7 quick overview of where we're going here.

8 MR. COLVILLE: Your Honor, pardon me for  
9 interrupting, this is Mike Colville. With regard to the dental  
10 claim, we can talk about it later, that means we're still on  
11 for trial February 5th and 6th -- because, as the court may  
12 know, I'm involved in a couple other trials in your courtroom  
13 as well right around there?

14 JUDGE McLAUGHLIN: Do you mean to tell me, Mr.  
15 Colville, this isn't the only case you're working on?

16 MR. COLVILLE: I didn't mean to sound like I was  
17 crying, your Honor.

18 JUDGE McLAUGHLIN: I didn't take it that way. I can  
19 tell you this isn't the only case that I'm working on, either.  
20 The dental case, what's the essence of that dental claim?

21 MR. LANZILLO: Failure to treat, your Honor. Just  
22 to make sure we're all on the same page with respect to that  
23 case, that is also a silica dust case. So you would be looking  
24 at essentially a deliberate indifference claim and the FTCA  
25 claim on that. You would be looking at essentially splitting

1     that case in two.

2             JUDGE McLAUGHLIN:  Isn't it anticipated that all of  
3     the silica dust cases are going to be tried at the same time --  
4     why couldn't I try this guy's silica dust case along with all  
5     the other silica dust cases, and then keep the dental claim  
6     right there as well?

7             MR. COLVILLE:  You could do that, your Honor.  If  
8     you're asking my opinion, again, Mike Colville.  That would be  
9     my preference.  Obviously, to the extent it is a separate  
10    claim, we will look at it separately on the merits to see if  
11    it's worthy of settlement or otherwise.

12            JUDGE McLAUGHLIN:  I don't see any point in making  
13    people try more cases than they have to.  And so you know, the  
14    February 5th and 6th dates, forget about it.

15            MR. COLVILLE:  Thank you, that's sort of where I was  
16    going.

17            JUDGE McLAUGHLIN:  We're going to try all these  
18    cases at the end of March.  Now, how long is it going to take  
19    on all of these cases to get them all done?

20            MR. COLVILLE:  Mike Colville again.  I would tell  
21    you what I would anticipate as far as who has to be called.  My  
22    medical expert, my industrial hygienist.  My dental expert.

23            JUDGE McLAUGHLIN:  This is assuming the cases are  
24    still around, obviously, but go ahead.

25            MR. COLVILLE:  Correct.  I intend on calling the

1 OSHA representatives who did the inspection. Obviously, the  
2 plaintiffs. All of the defendants. And there's probably about  
3 three or four witnesses who are either foremen or supervisors  
4 of the plaintiffs. That in a nutshell is the essence of the  
5 defense. That's not to rule out there might be one or two  
6 others.

7 JUDGE McLAUGHLIN: What about the plaintiffs?

8 MR. LANZILLO: Your Honor, largely a duplication of  
9 what you just heard from Mr. Colville. We will have our own  
10 medical expert. Our own industrial hygienist. The plaintiffs,  
11 perhaps some of the other prisoners as witnesses as well.

12 JUDGE McLAUGHLIN: I know you don't have a crystal  
13 ball, between the two of you, how many trials days do I need to  
14 set aside for this trial?

15 MR. COLVILLE: Sounds like two weeks to me.

16 MR. LANZILLO: Yes.

17 JUDGE McLAUGHLIN: Does to me, too.

18 JUDGE McLAUGHLIN: Well, I'm before I leave, has my  
19 Deputy Clerk given you a specific trial date for the silica  
20 cases yet?

21 MR. COLVILLE: No, your Honor.

22 JUDGE McLAUGHLIN: It will be sometime around March  
23 12th or thereabouts. Let's go off the record here.

24 (Off the record.)

25 (Whereupon, Judge McLaughlin leaves Chambers.)

1 JUDGE BAXTER: How many prisoners do you need to  
2 bring up?

3 MR. COLVILLE: Five, your Honor.

4 JUDGE BAXTER: Are you planning to do their  
5 depositions when they get here?

6 MR. COLVILLE: We've already done their depositions.

7 JUDGE BAXTER: Have we found Mr. Lamanna?

8 MR. LANZILLO: Yes, your Honor.

9 JUDGE BAXTER: Have you done Dr. Collins yet?

10 MR. LANZILLO: Not yet, your Honor, we have  
11 requested dates, I think we proposed some for all of the  
12 remaining defendants, remaining defendant depositions. We have  
13 received all the medical records and other information we  
14 requested pursuant to our written discovery. Which I think is  
15 what we needed to get our medical review done. And I don't  
16 know what defense counsel's availability is like in the next  
17 few weeks here, as far as getting the rest of these depositions  
18 completed. I think we have an agreement that we will conduct  
19 them all by video link depositions.

20 MR. COLVILLE: I'll do them any way you want.

21 JUDGE BAXTER: Mr. Lanzillo, do I understand you  
22 haven't responded to some written discovery?

23 MR. LANZILLO: I heard that comment, that took me by  
24 surprise, too. If we have written discovery that's owing, I  
25 apologize, but --

1           MR. COLVILLE: I was not bringing it up to point any  
2 fingers, just to note that we had some discovery out. I think  
3 merely it's a request for documents. What comes to mind, what  
4 I remember is asking for medical records that pre-exists prior  
5 to these plaintiffs going to prison, to see what their prior  
6 medical histories were.

7           MR. LANZILLO: Mike, I don't have any recollection  
8 of that. When did you send that?

9           MR. COLVILLE: I'll talk to you afterwards.

10          JUDGE BAXTER: All right. Now, did I understand you  
11 right, Mr. Colville -- if the medical examinations do not go  
12 the way you expect them to go, there would be no dispositive  
13 motion forthcoming?

14          MR. COLVILLE: On that issue. We would not file  
15 anything on that issue. But you know we're also having the  
16 case looked at by an industrial hygienist, to provide expert  
17 testimony with regard on whether or not this was a hazardous  
18 condition which could have been known, had been deliberately  
19 indifferent to. We're in process of engaging somebody at this  
20 point. We don't yet have somebody, I don't think we will be  
21 quick in doing that. We'll be quick in getting them the  
22 documents. That's on my radar, as well as an expert review of  
23 the medical case, which is a pretty simple record, I think a  
24 pretty simple matter for us to get to the bottom of one way or  
25 the other.

1 JUDGE BAXTER: All right. I'm just trying to think  
2 how quickly I can do a summary judgment motion, that's what I'm  
3 trying to do here. Let's go with February 2nd for dispositive  
4 motions. February 16th for a response. And that will give us  
5 a week plus to try to get that done. Will you have to do a  
6 reply?

7 MR. COLVILLE: Unless there's something that is  
8 crazy, I don't anticipate that.

9 JUDGE BAXTER: I will not give a discovery deadline,  
10 you just get in dispositive motions at that point. That is  
11 basically your deadline.

12 MR. COLVILLE: Again, your Honor, I appreciate all  
13 of this. I think Mr. Lanzillo does, of course, as well. My  
14 only comments would be, I do think a court order will go a long  
15 way in getting the Marshals to facilitate this as quickly as  
16 possible. At the risk of stating the obvious, we are at their  
17 will. And if they drag this out or cause further delay with  
18 regard to the IMEs -- I'm going to do my best on that.

19 JUDGE BAXTER: We have dates certain for your  
20 physician?

21 MR. COLVILLE: That's correct, your Honor.  
22 Essentially, what I'm saying in the order is they coordinate  
23 with me and the Bureau of Prisons to make specific inmates  
24 available on specific dates at St. Clair Hospital, and I give  
25 the address. I think I can work with the Marshal's office,

1 from my end it's really getting the Marshal's offices in South  
2 Carolina, West Virginia, Virginia --

3 JUDGE BAXTER: The other problem is where they're  
4 going to be housed when they're here. Because typically they  
5 house them in the Erie contract facility. Which is either the  
6 Erie County Prison or FCI McKean until they come to the Erie  
7 County Prison. That is under contract with the U.S. Marshals.

8 MR. COLVILLE: I thought they could hold them here  
9 in the holding cells in the federal courthouse in Pittsburgh.

10 JUDGE BAXTER: Are the holding cells available over  
11 night?

12 MR. COLVILLE: I think so.

13 JUDGE BAXTER: Our holding cells are simply holding  
14 cells.

15 MR. COLVILLE: I don't know, I've not had to do  
16 this.

17 JUDGE BAXTER: I don't think they are. The reason I  
18 say that is because when the renovations were done according to  
19 new C.F.R. regulations, they don't require them to be overnight  
20 facilities. I think the contract in Pittsburgh is at the  
21 Allegheny County Prison.

22 MR. COLVILLE: Okay.

23 JUDGE BAXTER: And then we'd have to writ them out  
24 of there to bring them to Erie. So unless the plan is to take  
25 them to FCI McKean and then drive them to Pittsburgh that day,

1 which would be a difficult way to do it. They fly into Grove  
2 City, that is where the U.S. Marshals fly into for this  
3 district.

4 MR. COLVILLE: With a March 12th trial date, is that  
5 a date that you are referencing based upon you reviewing a  
6 calendar?

7 JUDGE BAXTER: In working with the Deputy Clerk in  
8 Judge McLaughlin's office, obviously, he was not aware of the  
9 dates that we had worked out together.

10 MR. COLVILLE: Your Honor, it will begin on the 12th  
11 and then go the next two weeks.

12 JUDGE BAXTER: I thought they wanted some leeway to  
13 take care of the speedy trial problems with the criminal cases.

14 MR. COLVILLE: Then we'd be the first civil case  
15 after all the criminal cases?

16 JUDGE BAXTER: That's correct.

17 MR. COLVILLE: The 12th would be the earliest, we  
18 could be bumped back depending on what the criminal docket is?

19 JUDGE BAXTER: That's correct. Since it's a jury  
20 trial.

21 MR. LANZILLO: It might be helpful if we could talk  
22 to our clients about waiving a jury trial demand.

23 JUDGE BAXTER: I got to tell you, Judge McLaughlin  
24 would consider that helpful.

25 MR. COLVILLE: I think it might facilitate --

1 JUDGE BAXTER: That's something to work on.

2 MR. LANZILLO: Mike, you and I can talk about it, we  
3 can talk about that if it's appropriate and approach the court.

4 JUDGE BAXTER: Rich, when did you come on the case?

5 MR. LANZILLO: My goodness, judge, I don't even  
6 remember. Initially in November --

7 JUDGE BAXTER: Is it a year?

8 MR. LANZILLO: It may be, judge.

9 JUDGE BAXTER: All right. And, Mr. Colville, I  
10 understand we have totally different views on the OSHA reports.  
11 That caused the second group of dispositive motions, I'm just  
12 trying to think when this got out of hand?

13 MR. COLVILLE: I don't remember. Doug would  
14 remember the chronology, Doug was involved with all the  
15 briefing up to a point. My recollection, I thought my  
16 recollection was it took a while to get these things served.  
17 They didn't know who to serve, you gave them time for that to  
18 happen. The Marshals were a little slow in doing that. I  
19 believe the Siggers and Kelly cases were my two cases. I  
20 didn't have any other case until I got home from the pretrial  
21 conference, then I got three cases. After that we filed a  
22 motion for summary judgment or motion to dismiss and they may  
23 have filed an amended complaint at that point. Which then  
24 caused us to file additional motions.

25 MR. GOLDRING: There were actually I think three

1 rounds of briefing. The first resulted in a partial dismissal.  
2 And then we did a second round in the middle of that second  
3 round, I think is when Rich Lanzillo was appointed as counsel,  
4 and then filed an amended complaint in all of the cases. As  
5 result of the amended complaints in all the cases, our second  
6 round of briefing was mooted out. And then when Rich filed an  
7 amended complaint, then we filed a third round of dispositive  
8 motions based on the amended complaints.

9 JUDGE BAXTER: Which were quite, they were  
10 different?

11 MR. GOLDRING: Right. And then that's where we are  
12 now. That third round was decided and that's what led to the  
13 status conference earlier this year.

14 MR. LANZILLO: Judge, one of the problems when we  
15 tried to marshal all of these cases, get them on the same  
16 track, once that was accomplished while the motions were still  
17 pending, we were not permitted to take any discovery. While we  
18 had an extended period of motion practice, in reality we were  
19 working --

20 JUDGE BAXTER: You didn't sign a protective order?

21 MR. LANZILLO: No, judge. Under the rules, not  
22 until the initial case management conference and prior to the  
23 answer.

24 JUDGE BAXTER: He didn't have to answer at that  
25 point.

1 MR. LANZILLO: In terms of the approach taken by Mr.  
2 Goldring --

3 JUDGE BAXTER: Also, during that time, as I recall,  
4 the plaintiffs were being scattered --

5 MR. LANZILLO: Yes, they were. In lieu of the  
6 motion, straight motion to dismiss, we had multiple motions to  
7 dismiss, motions for summary judgment, which still tolled the  
8 answer period. So I think we only got answers to the complaint  
9 in September. Which Judge McLaughlin, I know he's looking at  
10 the case that's been --

11 JUDGE BAXTER: He was also looking at it to see how  
12 it got out of hand, looking back at the docket. My  
13 recollection is I was so thrilled to have an attorney marshal  
14 these cases through the system on your part, Mr. Lanzillo, I  
15 was giving you extensions time after time liberally.

16 MR. LANZILLO: You did, indeed, your Honor.

17 JUDGE BAXTER: But this would have been a very  
18 difficult case with the plaintiffs on their own.

19 MR. LANZILLO: You were very accommodating.

20 JUDGE BAXTER: It was too hard to have the  
21 plaintiffs continue on their own, it was just too difficult for  
22 the courts. And for the defendants, it would have been  
23 impossible to handle that volley.

24 JUDGE BAXTER: All right. Is the workshop still  
25 working?

1 MR. LANZILLO: It's not, your Honor. It ceased --

2 MR. GOLDRING: It's been almost a year, they  
3 switched over to a plastics factory.

4 JUDGE BAXTER: I can see that I'm going to be on the  
5 phone with you guys very often in the next few weeks, and I'm  
6 going to have the U.S. Marshals on the line with me, it's going  
7 to be the most difficult time of the case.

8 MR. COLVILLE: I'd agree, I think it will help  
9 streamline the other issues, your Honor, it will be worthwhile.

10 JUDGE BAXTER: Tick off for me where the plaintiffs  
11 are right now?

12 MR. GOLDRING: Kevin Siggers is still in McKean.

13 MR. COLVILLE: He's set to be released in the  
14 relatively near future. I purposely had him scheduled first, I  
15 have him scheduled December 21st of this year. I'm hoping and  
16 thinking that he is still there.

17 JUDGE BAXTER: Mr. Lanzillo, the government won't  
18 pay for him to come back if he's out of jail.

19 MR. COLVILLE: I don't know where, but he's supposed  
20 to go to a halfway house.

21 MR. GOLDRING: Released to a halfway house.

22 JUDGE BAXTER: Where from?

23 MR. GOLDRING: Cleveland.

24 MR. COLVILLE: If that's the case, I don't know you  
25 need a marshal at that point, so much as you do an order by the

1 court to be here for the independent medical examination.  
2 Which I'm sure he'll submit to. Somebody within the BOP may  
3 need something from the court saying he is allowed to leave the  
4 halfway house for this event. I say that without any prior  
5 experience of knowing.

6 JUDGE BAXTER: Halfway houses are even harder,  
7 that's why I'm sitting here dumbfounded. Then you're going to  
8 have to take a doctor to him.

9 MR. COLVILLE: I can subpoena him here.

10 JUDGE BAXTER: All right. Go ahead, so we have one  
11 temporarily at McKean?

12 MR. GOLDRING: McKean, and at Petersburg. Michael  
13 Hill is in West Virginia, FCI Gilmer in West Virginia. And  
14 Leslie Kelly is in South Carolina.

15 JUDGE BAXTER: They're all south, okay. They're not  
16 in Colorado?

17 MR. GOLDRING: Correct. They're all pretty close,  
18 at least within a day or two drive.

19 JUDGE BAXTER: They'll fly them into Grove City, I'm  
20 sure. All right. Have you hired your experts, Mr. Lanzillo?

21 MR. LANZILLO: We have, your Honor.

22 JUDGE BAXTER: Have you guys exchanged all that  
23 information already?

24 MR. COLVILLE: No, we don't know who they are.

25 JUDGE BAXTER: You have one yet to hire, is that

1 correct, Mr. Colville?

2 MR. COLVILLE: Yeah, as we speak, I'm trying to get  
3 an industrial hygienist, I'm going to have a dental expert  
4 brought on board. We have a pulmonologist at this point  
5 already.

6 JUDGE BAXTER: You're not even going to mess with  
7 now, which is my understanding, about deposing experts?

8 MR. COLVILLE: No. We don't anticipate deposing any  
9 experts.

10 JUDGE BAXTER: Thank you. Mr. Lanzillo.

11 MR. LANZILLO: Having not seen the report yet, your  
12 Honor, I would need to -- just by way of example, exposure  
13 experts, should the defense have one, there are a lot of  
14 assumptions that can be made regarding the level of silica dust  
15 that was in the air. To the extent an expert is rendering an  
16 opinion regarding exposure based upon an assumption that may or  
17 may not be valid, I would hate to waive the right to pursue  
18 depositions. I will say this. I have no desire to take  
19 unnecessary depositions, I would hope that the next expert  
20 deposition would be necessary.

21 JUDGE BAXTER: Let me ask another question. You  
22 mentioned inmate witnesses. Have you found, do you have names  
23 and do you know where they are, that's going to be another  
24 nightmare?

25 MR. GOLDRING: We have names of those folks in terms

1 of --

2 MR. LANZILLO: In terms of who would be appropriate.  
3 We would want to avoid redundancy. These would be other  
4 inmates in who have worked in the original facility or had  
5 direct contact with our folks.

6 JUDGE BAXTER: All right. Is there anything else?

7 MR. COLVILLE: Not from the United States, your  
8 Honor, at this point.

9 MR. LANZILLO: Thank you, your Honor.

10 JUDGE BAXTER: We're adjourned.

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12 (Whereupon, at 12:45 p.m., the proceedings were  
13 concluded.)

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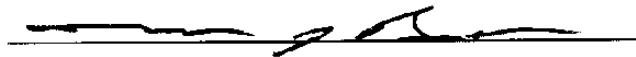
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C E R T I F I C A T E

I, Ronald J. Bench, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

A handwritten signature in black ink, appearing to read "Ronald J. Bench", is written over a horizontal line.

Ronald J. Bench